THE NEW NATIONAL PROCESSES AND ORGANS REQUIRED FOR ADOPTING AND EFFECTUATING THE COVENANT

ALPHEUS HENRY SNOW

THE situation which arises from the proposal that the United States shall adopt the instrument framed by the Paris Peace Conference and called by it "the Covenant of the League of Nations", is unprecedented in the history of the nation. It is, indeed, a situation which is likely to arise only once in the life of an independent state. The question is whether the United States shall enter into a union with other states, under an instrument which, though in form a treaty, is in fact a written constitution, ceding to the union a portion of its independence in consideration of a similar cession by each of the other states; the union having as its professed object "to promote international cooperation and to achieve international peace and security". If the United States decides to enter the League, it will, by the cession of the necessary part of the nation's independence, change its status from that of an independent state holding relations with other states solely under the law of nations, to that of a member state of a union, subordinate to the union, and whose relations to the other states and to the union are governed by the constitution of the union.

The question arises: By what processes and through what organs shall the United States act in making its decision upon the proposal to enter this union and in thus determining whether to change its status? It is held by many—indeed, it seems to be generally taken for granted—that the proper process is that of treaty, pure and simple; and that, therefore, this great decision may be made, in behalf of the people of the United States, by the President and Senate, the latter acting by two-thirds vote. Others hold that, inasmuch as the adoption of the Covenant will change the character of our government, the treaty-making power is inadequate, and that the change can be made only by amending the Constitution of the United States in the manner provided by the Constitution. Still others insist that as the change of government proposed

does not involve a change in any specific part of the Constitution but will amount to superseding the whole Constitution in certain respects by placing over it a super-constitution, the process for amending the Constitution is not applicable; and that inasmuch as all powers not expressly granted are, by the tenth amendment, reserved to the states respectively and to the people, the proper process is that of a constitutional convention of the states and people of the United States.

That the treaty-making process, pure and simple, is not a proper one in the present case would seem to be clear. The Constitution itself distinguishes between treaties of union and treaties of the ordinary kind by giving to Congress the power to admit new states into the Union. Evidently the admission of a state into an existing union is possible only by treaty between the union and the state, whatever may be the form of the action of the parties. This power to admit new states undoubtedly includes the power to incorporate annexed regions into the union. The reason why this power to change the character of the government by taking new elements of territory and population into its domestic body was vested in Congress, was explained by Justice (now Chief Justice) White in the *Insular Cases*. In the case of Downes *v.* Bidwell (182 U. S. 287, 312, 313, 319), he said:

> In view of the rule of construction . . . that all powers conferred by the Constitution must be interpreted with reference to the nature of the government and be construed in harmony with related provisions of the Constitution, it seems to me impossible to conceive that the treaty-making power by a mere cession can incorporate an alien people into the United States without the express or implied approval of Congress. . . . If the treaty-making power can absolutely, without the consent of Congress, incorporate territory, . . . it must follow that the treaty-making power is endowed by the Constitution with the most unlimited right, susceptible of destroying every other provision of the Constitution; that is, it may wreck our institutions. If the proposition be true, then millions of inhabitants of alien territory, if acquired by treaty, can, without the desire or consent of the people of the United States, speaking through Congress, be immediately and irrevocably incorporated into the United States, and the whole structure of our government overthrown. . . . .
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> When the various treaties by which foreign territory has been acquired are considered in the light of the circumstances which surrounded them, it becomes to my mind clearly established that the treaty-making power was always deemed to be devoid of authority to incorporate territory into the United States without the assent, express or implied, of Congress, and that no question to the contrary has ever been even mooted.

In the same case, Mr. Justice Gray said (page 346):

> So long as Congress has not incorporated the territory into the United States, neither military occupation nor cession by treaty make the conquered territory domestic territory in the sense of the revenue laws.

The treaty-making power was thus described by William Rawle, in his work, *A View of the Constitution of the United States* (ed. 1829, page 65):

> [A treaty] is a compact entered into with a foreign power, and it extends to all those matters which are generally the subjects of compact between independent nations. Such subjects are peace, alliance, commerce, neutrality, and others of a similar nature.

This conception of the treaty power as a power incident to sovereignty, to be exercised within the scope and in the manner established by the law of nations and by the practice of the leading independent states, runs through the literature of the public law which was in existence at the time the Constitution was adopted. By the law and practice of nations, treaties in general between independent states were made by the king or chief executive in council. Treaties of union, however, were not regarded as treaties but as constitutions of government and were made by parliaments in which all the estates of the realms of the uniting states were represented. This course was pursued in the case of the treaty of union between England and Scotland in 1707, generally called the "Act of Union", by which the two states became one under the name of Great Britain. The parliaments of each of the states authorized by identical statute the appointment of commissioners "to treat and consult" concerning a union and to make a "report" to the respective parliaments, and the parliaments by identical statute accepted and adopted their joint report called "Articles of Union". In the articles, the whole transaction is called a "treaty of union."

This view of the treaty-making power, as a power to make all such agreements with independent states as are usually made between independent states, but not to make any voluntary agreement with other states for a cession of independence, whether mutual or otherwise, or to change in any way the character of the government, is plainly that held by the Supreme Court of the United States. That Court, speaking by

Justice Field, in the case of Geofroy *v.* Riggs (133 U. S. 258, 266, 267), said:

> That the treaty power of the United States extends to all proper subjects of negotiation between our government and the government of other nations is clear. . . . The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or its departments, and those arising from the nature of the government itself and that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government, or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent. . . . But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country.

It seems clear, therefore, that the Covenant of the League of Nations, which is a super-constitution of a super-unity of which the United States is to be a member, cannot be adopted by the treaty-making process alone, since the treaty-making power does not extend so far as "to authorize a change in the character of the government". Any act which changes the character of the government is evidently an act done in the exercise of the constitution-making power, whether it has the form of a treaty, a law or an executive order.

The real question is: By what process shall the United States enter into a treaty of union having the effect to supersede in part the Constitution of the United States? This is the opposite case from a treaty of union for admitting into the union a new state or for incorporating annexed territory into the domestic body. A treaty of that sort is a treaty of union for expanding the national strength and influence; a treaty whereby the United States is itself admitted to a union, is a treaty for contracting the national powers and has a tendency to weaken the national strength and influence.

Congress is declared to have power as respects treaties for the purpose of expansion, because, as Chief Justice White has said, it represents the interests of the people of the United States, all of whom are vitally concerned in having the domestic body of the nation kept homogeneous and Americanized. It seems necessarily to follow, *a fortiori*, that Congress, as guardian of these vital interests, must have power as

respects treaties for the purpose of contracting the national powers and placing the population in an intimate permanent union and relationship with peoples having standards and ideals different from and possibly destructive of those of the American people.

It seems far more harmonious with the general plan of the Constitution to hold that the Constitution by necessary implication intrusts to Congress this preservative function, as the guardian of all the people, of determining whether the United States shall partially extinguish itself in a union than to hold that the constitutional process for determining such a question is that of constitutional amendment or of constitutional revision through a general constitutional convention. By the practice of nations, the legislature of each independent state is regarded as the guardian of all the people in cases where a change in the external relations of the state is proposed, which, if carried into effect, will make a difference in its domestic constitution or diminish its independence, or which is calculated to affect adversely the standards and the ideals to which its people have attained.

Congress undoubtedly may and should utilize the treaty-making process as a part of the process by which it acts as the guardian of the nation's interests. This might be accomplished by Congress providing in the act or resolution determining its procedure that in case the adoption of the Covenant should be approved by Congress, the Covenant should then go to the Senate, which should act upon the Covenant as a treaty, determining the question of its ratification by two-thirds vote.

It would seem clear that Congress, in thus exercising this extraordinary power of acting as the guardian of the interests of all the people in determining whether it is advisable for the United States to enter into a union with foreign states, is not obliged to sit, or to proceed, in the manner which the Constitution establishes for it when it is exercising its strictly legislative powers. If this interpretation is correct, it would follow that Congress, in the act or resolution determining its procedure in this extraordinary case, might provide that the two Houses should sit in joint session and deliberate by states, the senators and congressmen from each state con-

stituting the state delegation and each state delegation having one vote. It might also be provided that the question whether the Covenant should be approved by Congress should be determined in the affirmative only by the affirmative vote of three-fourths of the states, cast by the state delegations in the manner mentioned. The principle established by the Constitution that the assent of three-fourths of the states is necessary for amending the Constitution, would thus be preserved. If Congress should thus decide that it was advisable for the United States to enter into the Covenant, the Senate would then proceed to deliberate upon the ratification of the Covenant as a treaty, and if it should ratify the treaty by a two-thirds vote, there would be every probability that the union proposed by the Covenant is worthy the adherence of the United States.

It is not derogatory to the Senate that a special procedure of the kind suggested should be adopted, according to which the legislative power and the treaty-making power would act jointly. The question whether independent states shall voluntarily yield a portion of their independence in order to enter a union, is of too high and solemn a character to be decided by a single branch of the government of a state. The legislature and the executive must together perform the great duty and take the great responsibility. It is for this reason that the Covenant will be submitted for adoption to the parliaments of the other states which are to be the members of the League.

The question of the right of Congress to participate in determining whether the United States shall enter the League, is not a question of the right of the House of Representatives to act in the making of treaties, though the modern tendency is strongly in the direction of allowing the popular branch of the legislature to participate in the making of all important treaties. It is one thing to hold that Congress, as guardian of the interests of all the people, has the right and duty, under the law of nations and the Constitution, to participate with the ordinary treaty-making organs of the United States in determining whether the United States shall adopt a treaty having the nature of a super-constitution, which, if adopted, will change the character of our government by converting what have been the foreign relations of the United States into external domestic relations. It is a wholly different thing to

hold that the House of Representatives has the right under the Constitution to participate in the making of all treaties of the ordinary kind or even in those of great economic or political importance.

The reasons why the power to make ordinary treaties was conferred on the President and Senate and not on Congress, are thus stated by William Rawle in his book above cited, *A View of the Constitution of the United States of America* (ed. 1829, page 65). Speaking of the alternatives which presented themselves to the Constitutional Convention as respects the branch or branches of the government which should be the depositary of the ordinary treaty-making power, he said that the choice was between vesting this power "in Congress generally, in the two Houses exclusive of the President, in the President conjointly with them or one of them, or in the President alone."

He thus states the reasons which determined the choice in favor of the President and Senate (pages 65, 66):

> The formation of a treaty often requires secrecy and dispatch, neither of which could be found in the first or second mode, and a contrary plan would be inconsistent with the usages of most nations. It remained then either to vest it in the President singly, or to unite one of the other bodies with him. The latter was obviously preferable, and all that remained was to select the one whose conformation appeared most congenial to the task. The Senate is a smaller body, and therefore, whenever celerity was necessary, the most likely to promote it. It was a permanent body; its members, elected for a longer time, were most likely to be conversant in the great political interests which would be agitated, and perhaps it was supposed that, as representatives in one point of view rather of the states than of the people, a federative quality appertained to them not wholly unconnected with the nature of a foreign compact.

The reasons stated by Rawle are those which have always been understood to have influenced the Constitutional Convention in vesting the treaty-making power in the President and Senate. These reasons were no doubt excellent at the time (though now steadily growing less and less cogent) and fully justified the Constitutional Convention in making the decision which it did concerning the depositary of the power to make ordinary treaties. But these reasons did not have in 1787, and have not now, any application to that extraordinary treaty-making and constitution-making power which is exer-

cised when an independent state enters into a treaty of union. In this extraordinary case, there is no need for either secrecy or dispatch. The need is for publicity and for slow and calm deliberation. There is no reason to suppose that the Senate will be more "conversant in the political interests" involved than the whole Congress of the United States. Such a treaty is not entered into primarily by the states of the Union, but by the people of the United States primarily and by the states incidentally, and the Congress of the United States is, by the law of nations and the Constitution, the guardian of the vital and fundamental interests and rights of the people of the United States when these great interests are affected by a constitutional document having the form of a treaty, which is proposed to the United States for its adoption.

The effect of the proposed Covenant will be, as has been above shown, to change our relations with all the states which shall be members of the League from foreign relations into external domestic relations. If this be its true effect, the fact will be that, in case the United States shall decide to enter the League, it will find itself without proper organs to enable it to maintain its rights and to fulfil its duties under the League unless it shall previously have instituted such organs. The State Department is organized to deal with foreign relations; the others to deal with internal relations. It is not generally realized that we have always had some external domestic relations. We have always had external domestic territories which were incorporated into the Union; and by the Spanish War we acquired insular countries which are still in subordinate and dependent union with the United States. Our relations with some of these subordinately united countries are in charge of the War Department; our relations with others of them are in charge of the Interior and Navy Departments. The use of these departments as organs of the government for handling these kinds of external domestic relations serves for the present in view of the powerlessness of these subordinately united regions; but such use of the existing departments will not be possible when the vast volume of external domestic relations which will arise from the moment when the League comes into operation, and which will daily grow in extent and insistency, is poured upon the United States. In order to

meet this new situation successfully, it will be necessary to be prepared in advance with suitable organs of government, under penalty of the vast loss which is certain to be caused to any nation in every case in which it permits itself to be unprepared to meet a great emergency.

A question which the United States must face and at once settle, if it decides to enter the League, therefore, is: What kind of an organ is necessary to handle successfully the new external domestic relations of the United States with the other states of the League? The answer would seem to be that there must be a new department of the government to deal with these relations. On account of the mixed character of these relations, it seems that the new organ or department should be composed of the heads of those existing departments which deal with our foreign relations and with such of our domestic relations as have an international aspect. The action taken by Congress during the war in establishing the Council of National Defence, would seem to furnish a precedent in instituting the new organ. When the United States entered into association with the powers of the European Entente, to prosecute the war against the Central Powers, its relations with the Entente Powers became, for the period of the war, assimilated to external domestic relations rather than to foreign relations. In order to prosecute the war successfully, there had to be both national concentration and international cooperation. To meet the situation arising from the existence of these new relations, there was established by act of Congress (Army Appropriation Act, approved August 29, 1916, Sec. 2, U. S. Statutes at Large, Vol. 39, pages 619, 649, 650) a Council of National Defence which was virtually a department of the government, but was of a composite character. The function of the new department was declared to be "the coordination of industries and resources for the general welfare". It was provided that there should be two parts of the new organ, an upper and a lower body. The upper body, or Council of National Defence proper, was to consist of the Secretary of War, the Secretary of the Navy, the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Commerce and the Secretary of Labor. The lower body was called the "advisory commission". The act provided that it

was to be composed of not more than seven persons, nominated by the Council and appointed by the President, and that each of these persons should " have special knowledge of some industry, public utility, or the development of some natural resource, or be otherwise specially qualified, in the opinion of the Council, for the performance of the duties " of the department. Provision was also made for the appointment of expert sub-commissions and of individuals as expert investigators. The duties of the Council, as specified in the act, were, as follows:

To supervise and direct investigations and make recommendations to the President and the heads of executive departments as to the location of railroads with reference to the frontier of the United States, so as to render possible expeditious concentration of troops and supplies to points of defence; the co-ordination of military, industrial and commercial purposes in the location of extensive highways and branch lines of railroad; the utilization of waterways; the mobilization of military and naval resources for defence; the increase of domestic production of articles and materials essential to the support of armies and of the people during the interruption of foreign commerce; the development of sea-going transportation; data as to amounts, location, method and means of production, and availability of military supplies; the giving of information to producers and manufacturers as to the class of supplies needed by the military and other services of the Government, the requirements relating thereto, and the creation of relations which will render possible in time of need the immediate concentration and utilization of the resources of the Nation.

The reason why this statute was adopted and the new organ or department instituted was that it had been found by experience that the external domestic relations of the United States with its associates during the war could be handled successfully only by a new department of the government adapted to bring about the requisite national concentration and international cooperation. In order to cooperate in a military association with other states, the United States found it necessary to visualize itself and to act, as a unit of a union, for producing and placing in the field an army and navy provided with adequate food, shelter and munitions of war, so long as the war should last.

Peaceful cooperation with other states will also require the United States to visualize itself and to act permanently, as a unit of a union for producing and placing in the field an army of organizers and workers provided with adequate food,

shelter, and the appurtenances of civilization adapted to the pursuit of happiness, for utilizing the materials and forces of nature for human benefit and equitably distributing the product among the states, peoples and individuals of the world. In order to deal successfully with these new and vast external domestic relations which will arise under a union which, like the one proposed, is "to promote international cooperation and to achieve international peace and security", it will be necessary, it would seem, to institute by act of Congress, a new organ or department of the government, based on the principles of the Council of National Defence. The new department might perhaps be called "The National Council of International Cooperation". It might be composed of the Secretary of State, as chairman, and the Secretary of the Interior, the Secretary of the Treasury, the Secretary of Agriculture, the Secretary of Commerce and the Secretary of Labor. The same provision for the appointment of the expert advisory commission and of sub-commissions and expert advisers and investigators should undoubtedly be made. The function of the new department would be to investigate and inform itself concerning all matters falling within the jurisdiction of the League and to advise the President and Congress concerning any of these matters regarding which the United States might be called upon to make a decision.

The underlying principle upon which to base the action of the United States, in establishing such a new department would be that cooperative life is an art which can be acquired only by study and experience. It is a fact of general knowledge that only persons and nations of high attainments in intelligence and conscientiousness can appreciate the reasons and motives of enlightened self-interest which form the basis of the cooperative philosophy and actually do what cooperation requires. The units of a cooperative society must all be equally well-informed, intelligent and conscientious. International cooperation is impossible except by intelligent and conscientious nations, each of which has its own organ of investigation and judgment dealing with the affairs of the world in all their phases and acting as adviser to its executive and its legislature.

The institution of such a department as above outlined, con-

temporaneously with the entry of the United States into any super-union, is dictated not merely by principle. It is enjoined upon us also by considerations of prudence. The proposed Covenant, or any other similar super-constitution, if adopted, will establish a body in the world which, even though given only advisory powers, will exercise a great influence. Experience proves that such an influence will tend to become actual political power. One has only to remember the influence and power which the Roman Papacy has had and still has in the affairs of the world, and that which great newspapers, like the *London Times* of a half-century ago, have exercised in international politics, to realize that advisory power in a person or personality of acknowledged leadership, especially if accompanied with the power of investigation and publication, must be classed, in its actual effect, as real political power. Against even the advisory action of a body recognized as having international leadership, each nation must be prepared. Each nation must have knowledge of world affairs equal to that of the body sitting at Geneva, or the advice of Geneva will be in effect the command of a superior to an inferior. The United States, in particular, must be prepared for the new emergency; for, if it is not intellectually prepared to meet with facts and arguments the advice emanating from Geneva, its geographical location may lead to political situations in which the body sitting at Geneva, voicing the sentiment of Europe, or of Europe and Asia, may succeed in giving advice to the United States or to America which will in fact be a command. Against such contingencies, provision should, it seems, be made at the instant the United States decides to enter into the League, if it does so decide. To delay the institution of the new department or organ would tend to involve the nation in a maze of complications caused by the attempt of the existing departments to deal with the new relations. It seems clear, therefore, that the question of the adoption of the Covenant and of the institution of the new department should be considered and decided together so that the moment the League begins to operate, at that moment the new department of the United States may begin also to operate. The principle that " eternal vigilance is the price of liberty " evidently applies to the new situation presented by the proposal to enter the League, in all its phases, present and future.